

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA COMMISSIONER OF COMMERCE

In the Matter of the Certificate
of Authority of American Family
Mutual Insurance Company, a
Wisconsin corporation.

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Allen E. Giles on March 27, 1995, commencing at 9:30 a.m. at the Minnesota Department of Commerce, 133 East Seventh Street, St. Paul, Minnesota.

Appearing on behalf of the staff of the Minnesota Department of Commerce (hereinafter also referred to as "American Family" or Respondent) was Michael A. Sindt, Assistant Attorney General, Suite 1200, 445 Minnesota Street, St. Paul, Minnesota 55101-2130.

Appearing on behalf of the American Family Mutual Insurance Company (hereinafter also referred to as "American Family" or Respondent) was Richard L. Evans, Attorney at Law, McGrann, Shea, Franzen, Carnival, Straughn & Lamb, Chtd., 2200 LaSalle Plaza, 800 LaSalle Avenue, Minneapolis, Minnesota 55402-2041.

The record in this proceeding closed upon receipt of the reply memorandum of the Department on May 24, 1995.

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Commerce will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact James E. Ulland, Commissioner of Commerce, 133 East Seventh Street, St. Paul, Minnesota 55101, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

Whether Respondent engaged in unfair settlement practices in violation of Minn. Stat. § 72A.201, subd. 8(2) or has engaged in conduct or activities that constitute unfair trade practice in the business of insurance, in violation of Minn. Stat. § 72A.20, subd. 12(4) and (6).

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. American Family Mutual Insurance Company is a Wisconsin corporation authorized to transact business as an insurance company in the State of Minnesota pursuant to a certificate of authority issued by the Commissioner of Commerce.

2. Ernestine Perry, a resident of Minneapolis, Minnesota, owns an insurance policy issued by American Family. The insurance policy provides insurance coverage for her automobile.

3. On July 1, 1993, after a shopping trip, Ms. Perry was unable to get her car started. She asked Rudy Thomas Pope to help her get the car started. Because Ms. Perry was unable to keep the car running, she permitted Rudy Thomas Pope to drive her home from the shopping center. Rudy Pope is a 14-year-old male. On July 1, 1993, he did not have a license to drive.

4. While traveling westbound on Broadway Avenue, Rudy Pope collided with three other automobiles at the intersection of Logan Avenue North and Broadway. The other automobiles were stopped at the intersection waiting for the light to change.

5. After the collisions, the drivers stepped out of their cars. When Ms. Perry and Rudy Pope got out of Ms. Perry's car, the other drivers observed that Rudy Pope appeared to be a minor. They observed that he looked like a "young boy", was skinny and about four feet eight inches tall. Tr. 34. The other drivers wanted to know why this young boy was driving the car.

6. Ms. Perry told the other drivers that she was unable to start her car. Rudy Pope, however, was able to start the car and keep it running, and for that reason he was driving her to her destination. Tr. 36-37; 55.

7. The police officers who responded to the accident scene interviewed the persons involved and filed a report on the accident. Ex. 11. The police indicated that Pope helped get Ms. Perry's car started and was driving her home. In addition, Pope had apparently falsely reported to Ms. Perry that he possessed a driver's license. The police officers made the following report:

Officers responded to a four-car PD. Def. stated he was 14 years old and did not have a DL. Def. said he was driving the vehicle for the owner who was with the def. Perry, owner, said the def. told her he had a DL. Perry stated she couldn't get her car started and the def. helped her start it. Def. then said he had a DL and would drive it home for her. Def. was tagged for NODL and released to his father who was working at SUBWAY, 521 Broadway. See accident report for more information.

8. One of the persons rear-ended in the accident was Jason Koppendrayer. At the accident scene, Mr. Koppendrayer obtained the name of the insurance company

that insured Ms. Perry's vehicle. Mr. Koppendraye called American Family to report what had happened at the accident scene. He was given a claim number and was told that a representative of American Family would contact him. American Family authorized him to get a rental car. Tr. 38.

9. Mr. Koppendraye talked with American Family's Claims Examiner Gary Brus on July 2, 1993. At that time, Mr. Brus authorized Mr. Koppendraye to rent a car until July 8, 1993. Mr. Brus also arranged a time for Mr. Koppendraye to bring his car to one of American Family claims adjustment facilities so that the car could be estimated. Tr. 145.

10. Mr. Koppendraye had a meeting with Mr. Brus. At that meeting, Mr. Koppendraye told Mr. Brus what had been said at the accident scene. He repeated the statement volunteered by Ms. Perry: she was not able to keep the car running and that Pope was driving her home because he could keep the car running. Tr. 38-39.

11. On the 6th or 7th of July, Mr. Brus got a detailed statement from the insured, Ms. Perry. Ms. Perry apparently stated to Mr. Brus that she did not give Rudy Pope permission to drive her car. Approximately two to three days after speaking with Ms. Perry on July 8 or 9, Mr. Brus informed Mr. Koppendraye that his claim would be denied. Tr. 145-46. The denial occurred five business days after the accident occurred.

12. In addition to Mr. Koppendraye, American Family's representatives interviewed two other persons involved in the accident, a Mr. Schultz and Ms. Perry. Tr. 137-39. American Family's representatives did not interview Rudy Thomas Pope or David Vukson, another person involved in the accident. Mr. Vukson's automobile was insured by Prudential Insurance Company. Acting on his behalf, Prudential Insurance Company contacted American Family regarding liability for coverage.

13. American Family has denied all claims of liability with respect to the accident occurring on July 1, 1993 involving Ms. Perry's automobile.

14. The basis for this denial is Ms. Perry's statement to American Family that she did not give permission to Rudy Thomas Pope to drive the automobile. Ms. Perry apparently admitted to American Family that she had trouble starting her automobile and that Rudy Thomas Pope helped her start the car. Because Rudy Pope was not insured by American Family, the Company denied liability.

15. On August 17, 1993, Jason Koppendraye filed a complaint with the Minnesota Department of Commerce claiming that American Family had unreasonably failed to accept responsibility for damages arising out of the automobile accident occurring on July 1, 1993. The complaint was filed with the assistance of Jason's uncle, J. LeRoy Koppendraye, a Minnesota State Representative. Exs. 4 and 5.

16. The Department of Commerce conducted an investigation into the complaint. At the conclusion of that investigation, the Department determined that it was unreasonable for American Family to deny liability for Mr. Koppendraye's claim. The Department concluded in a letter dated September 23, 1993, as follows:

It is clear from everybody's version of the story that your insured gave Rudy the keys to the vehicle and allowed him to sit in the driver's seat, having complete control of the ignition system, steering wheel, gas pedal, brake, and all other functions necessary to drive a vehicle on two occasions. On the second occasion of starting the vehicle for your insured, Rudy decided to drive the vehicle for whatever reason. Even though your insured verbally protested and otherwise attempted to stop Rudy from driving, an accident occurred. It is our department's position that because your insured openly gave a 14-year-old care, custody and control over a motor vehicle on a city street, that even though she verbally told him he could not drive, she relinquished the right to deny liability for his actions. Damage to an innocent party occurred based on the actions of your insured, who turned over the control of the vehicle.

Ex. 8.

17. American Family responded in a letter dated October 8, 1993; the Company disagreed that it had any liability with respect to the accident. American Family stated in part as follows:

We have reviewed our position in this matter, as you requested that we do. Our position continues to be that the 14-year-old was not an insured under our policy because he did not have permission to drive the car.

In this situation, the insured allowed the 14-year-old to start the car. But by driving the car under her continuous protest, he was clearly exceeding the scope of permission.

Disputes such as this have been left for the courts to decide. We believe our position of denial can be defended.

Ex. 9.

19. The Department of Commerce and American Family were unable to resolve differences with respect to resolution of the complaint by Mr. Koppendrayar. A Notice of and Order for Hearing was issued on January 9, 1995 initiating this contested case proceeding. Ex. 2. An Amended Notice of and Order for Hearing was issued on March 23, 1995.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner of Commerce and the Administrative Law Judge have jurisdiction to consider the issues raised in this proceeding pursuant to Minn. Stat. §§ 14.50 and 72A.22 (1994).

2. The Notice of and Order for Hearing and the Amended Notice of and Order for Hearing were proper and the Department of Commerce has complied with all relevant procedural and substantive provisions of law and rule.

3. Pursuant to Minn. Stat. § 60A.052, the Commissioner is authorized to revoke or suspend a certificate of authority where a certificate holder has “violated or failed to comply with, any of the provisions of the insurance laws, including chapter 45 or chapters 60A to 72A or any rule or order under those chapters.”

Minn. Stat. § 72A.20, subd. 12 includes as unfair trade practices in the business of insurance:

(4) refusing to pay claims without conducting a reasonable investigation based upon all available information; and

(6) not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear.

4. Minn. Stat. § 72A.201, subd. 8(2) includes as an unfair settlement practice the following:

(2) denying a claim without having made a reasonable investigation of the claim.

5. Ms. Perry allowed Rudy Pope to drive her home because she could not herself keep the car running. Because Ms. Perry gave Rudy Pope the keys to operate the automobile and to drive her home, Rudy Pope was acting as the agent of Ms. Perry. Minn. Stat. § 170.54 states as follows:

Whenever any motor vehicle shall be operated within the state, by any person other than the owner, with the consent of the owner, express or implied, the operator thereof shall in case of accident, be deemed the agent of the owner of such motor vehicle in the operation thereof.

6. Because Ms. Perry is liable for the acts of Rudy Pope, Respondent unreasonably denied the claim of Mr. Koppendrayer when liability of its insured was “reasonably clear” in violation of Minn. Stat. § 72A.20, subd. 12(6).

7. Because Respondent had not obtained all available information for the evaluation of Mr. Koppendrayer’s claim before it was denied, Respondent has failed to comply with Minn. Stat. § 72A.20, subd. 12(4).

8. Because Respondent’s insured must be held responsible for her surrendering control of her automobile to a minor, it was unreasonable for Respondent to deny Mr. Koppendrayer’s claim.

9. Because Respondent was aware of Ms. Perry's statement that Rudy Pope was driving her home, it was unreasonable to conclude that Ms. Perry had not given permission.

10. Based on Conclusions 8 and 9 above, Respondent has failed to comply with the Fair Settlement Practices Act, particularly Minn. Stat. § 72A.201, subd. 8(2).

Based upon the foregoing Conclusions, and as discussed in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Commissioner of Commerce take adverse action against the certificate of authority of American Family Mutual Insurance Company.

Dated this 18th of July, 1995.

ALLEN E. GILES
Administrative Law Judge

Reported: Transcript, one volume (from tape recording).
Brennan & Associates, Court Reporters
One Appletree Square, Suite 202P
Bloomington, Minnesota 55425

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

Permission to Drive

The ultimate factual issue in this case is whether Ms. Perry gave Rudy Pope permission to drive her vehicle. The Judge has little difficulty finding, based on this record, that Ms. Perry gave Rudy Pope permission to drive her automobile. All of the oral testimony supports a finding that Rudy Pope was driving Ms. Perry to a destination, her home. The testimony of Mr. Koppendraye and Mr. Vukson support this finding. The police report, Exhibit 11, corroborates this testimony. The testimony from persons who were at the accident scene on July 1 is consistent on this question. American

Family has sponsored no testimony, oral or documentary, from a person at the accident scene that calls into doubt the testimony of Mr. Koppendrayer, Mr. Vukson or the police report. Exhibit 11. Based on the foregoing, the Administrative Law Judge finds that there is a preponderance of evidence that Rudy Pope was driving with Ms. Perry's permission and was driving her home.

American Family claims that, although Ms. Perry allowed Rudy Pope to start her car on two occasions, she repeatedly asked Rudy Pope to stop driving the car. There is no support on this record for this factual assertion. However, even if there was testimony from Ms. Perry along the lines asserted by American Family, that would be inadequate to enable Ms. Perry to avoid responsibility for her surrendering control of the automobile to Rudy Pope. Allowing her to avoid responsibility and allowing American Family to deny liability coverage would be contrary to public policy. From the point in time that Ms. Perry enabled Rudy Pope to operate her vehicle by giving him the keys, he was acting as her agent in accordance with Minn. Stat. § 170.54 (1994). The Minnesota Supreme Court has adopted the policy that innocent third parties should not be punished and suffer economic distress in an automobile accident at the hands of an unauthorized second-party driver. The Minnesota Supreme Court has said: "The public policy of this state follows a liberal interpretation of the statute and liability policy omnibus clause so as to afford compensation to victims of automobile accidents." Milbank Mutual Ins. Co. v. United States Fidelity & Guarantee Co., 332 N.W.2d 160, 165-67 (Minn. 1983). Because a minor is involved, it would appear that the public policy applies with even greater force. Jones v. Fleischhacker, 325 N.W.2d 633 (Minn. 1982).

Violations

Because Rudy Pope collided with automobiles waiting at the intersection while driving with the permission of Ms. Perry, Ms. Perry is responsible for the damage that resulted from the accident. American Family engaged in an unfair settlement practice because Ms. Perry's liability was reasonably clear, yet it denied liability for claims arising out of the accident.

American Family also failed to act reasonably based on the information it had. American Family knew or should have known that two persons at the accident scene and the police observed that Ms. Perry stated that she permitted Rudy Pope to not only start her car but also to drive her home. American Family's investigation is unreasonable because despite this knowledge the Company committed itself to supporting the equivocal statement of its insured: that she gave him permission to start the car but not to drive. It is unreasonable for American Family not to also consider the observations of other persons at the accident scene who observed her volunteer that Rudy Pope was driving her home.

Finally, American Family's investigation is not based on observations of other drivers at the accident scene or the information contained in the police report, it did not consider all available evidence before it denied Mr. Koppendrayer's claim. Based on the record in this proceeding, at the time American Family denied Mr. Koppendrayer's

claim, American Family had not obtained Exhibit 11, the police report, and had not spoken with Mr. Vukson. Both the police report and Mr. Vukson provide information that raises doubt with respect to Ms. Perry's assertion that Rudy Pope was driving without her permission.

AEG